Michigan Consolidated Gas Company *and* **Local 132, International Chemical Workers Union, AFL–CIO.** Case 7–CA–18953

April 30, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On December 29, 1981, Administrative Law Judge Marion C. Ladwig issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Michigan Consolidated Gas Company, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the Administrative Law Judge that the Charging Party's amended charge filed on March 30, 1981, alleging that Respondent's unilateral action on October 1, 1980, violated Sec. 8(a)(5) and (1) of the Act, was timely filed within the 10(b) period. In any event, even assuming *arguendo* that, as Respondent contends, its unilateral action occurred on September 28 not October 1, then the time limitation of Sec. 10(b) was met by the timely filed charge on February 23, 1981. Both charges arose out of the same course of conduct by Respondent, and allege the same violations. Therefore, the March 30 charge relates back to and is properly encompassed within the February 23 charge as "other acts" in violation of Sec. 8(a)(5) and (1). See *Air Express International Corporation*, 245 NLRB 478, 487, fn. 18 (1979).

[2] In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on any backpay due based on the formula set forth therein.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge: This case was heard at Grand Rapids, Michigan, August 31 and September 1, 1981.[1] The charge was filed by the Union on February 23, 1981[2] (amended March 30), and the complaint was issued April 21 (amended August 17, 1981).

On July 25, the Union was certified to represent the Company's first separate office-clerical bargaining unit. On October 2, without having raised the subject in negotiations and contrary to statements previously made by Industrial Relations Director Louis Barr, the Company informed the Union that it had canceled the merit increases and cost-of-living adjustments which the employees were due October 1 under the merit program. The Company had secretly decided that if the Union did not raise the subject before the due date, "that would be considered a waiver" of the employees' interest in the merit program.

The primary issues are whether the Company, the Respondent, (a) restrained and coerced the employees in the exercise of their Section 7 rights by removing them from the merit program, and (b) made the changes in working conditions unilaterally, without prior notice to the Union, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the Company's brief, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Company, a Michigan corporation, sells and distributes natural gas at its facility in Grand Rapids, Michigan, where it annually receives gas and other goods and materials valued in excess of $50,000 directly from points outside the State. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Withdrawal of Merit-Program Benefits*

1. The merit program

For many years, the Company has had a merit program that covers about 2,400 exempt and nonexempt, nonunion employees who are not in any bargaining unit. As explained at the hearing by Stephen Ewing, who in 1980 was vice president of personnel and administration, "historically for the 1st ten years anyway" the "program was put into effect on April 1st of each calendar year.

[1] Case 7–CA–19596, which was settled after being consolidated with this case August 17, 1981, was severed at the hearing.

[2] All dates are from July 1980 until April 1981 unless otherwise indicated.

Beginning in 1975, in addition to wage adjustments based on merit, there would also be an adjustment that would reflect the cost of living increase. That practice of wage and COLA adjustments on April 1 continued until 1979." Then, as a result of Federal wage and price guidelines, "it was a corporate decision to accelerate the 1980 program from April 1st, 1980 to October 1st, 1979, and that October 1st date has remained in effect since that time."

On September 4, 1980, Vice President Ewing issued instructions (Jt. Exh. 3) to all activity heads for implementing the 1980–81 merit program, providing for a budgeted 8.5-percent increase, 4 percent to "be allocated to merit and the remainder to COLA." He directed that "Recommendations for merit adjustments for your employees should be made effective October 1, 1980," although all increases were payable from Sunday, September 28 (the beginning of the pay period). He instructed that 24 cents of the current 29-cent COLA (which was paid quarterly) would be "rolled-in" (or included in) the weekly wage (the remaining 5 cents being a "float" for absorbing any decrease in the cost of living), and that the ceiling of 24 cents was to be raised, under a revised COLA formula, to 45 cents (up to a 9-percent increase in the CPI), plus the 5-cent float, totaling 50 cents an hour.

As described in the Company's brief, at issue is the Company's "decision not to implement" to the bargaining unit employees the "non-bargaining unit" merit program, which it admits is their "traditional merit and cost of living adjustment program."

2. Promise of no reprisals

Originally, Industrial Relations Director Louis Barr (who was not called to testify) was scheduled to bargain with the Union on the economic issues.

After the Union was certified July 25 to represent a new bargaining unit of clerical employees at the Grand Rapids distribution office on Wealthy Street and before the formal negotiations began on September 8, Barr and his subordinate, Labor Relations Manager Mark Hickey, met with International Representative Clarence Gipson and Union President John Meagher for lunch. Barr, who had not participated in the Company's campaign to defeat the Union in the July 17 election, had a good personal relationship with Gipson, who since 1975 had been assisting the Union and other locals in dealings with the Company. Barr regularly met with Gipson at lunch about every 3 to 6 weeks to discuss any pending problems.

It is undisputed, as Gipson credibly testified, that Barr told him and Meagher at this luncheon meeting, held August 25, "we're not going to take any reprisals . . . . The fact that they took a union is not going to make any difference." Barr promised to "not change any existing benefit or the way the people were treated," and that they would go on just like they were. (From his demeanor on the stand, Gipson impressed me most favorably as an honest, forthright witness, doing his best to give an accurate account of what happened.)

Barr also made it clear that he would take an active part in the negotiations. After Gipson assured him "we don't intend to try to plow any new ground" (beyond the field and service employees' new contract Gipson had helped the Union negotiate earlier that year), Barr responded that "Hickey will come in and handle the noneconomics, and when he finishes that up, I . . . will come in and we'll work out the economics." Meagher recalled Barr's saying that Hickey "would take care of all noneconomic matters" and that Barr "would come in from Detroit and take care of all the economic matters." I discredit Hickey's claim that "Absolutely not," nothing was said in this meeting about him handling only noneconomic issues. (Hickey impressed me as being less than candid.)

As it turned out, Barr's superior, Vice President Ewing, had far different plans for the negotiations. Contrary to Barr's intentions of handling the negotiations in a routine manner, without taking any reprisals against the employees or changing their existing benefits, Ewing had adopted a strategy for stripping the bargaining unit employees of merit-program benefits.

3. Secret "waiver" strategy

On three previous occasions, clerical employees at the Grand Rapids distribution office had failed in their organizational efforts. This time, despite the Company's vigorous antiunion campaign led by Vice President Ewing (whose campaign speech and literature are discussed below), a majority of the employees voted for the Union. (An organizing campaign at the Grand Rapids downtown office on Monroe Street has not been successful. As testified by International Representative Gipson, "We have an organizational campaign at the Monroe Street, but we haven't quite won that one yet.")

On July 29, 4 days after the Union's certification, Vice President Ewing met with two company officials, Western District General Manager Jerald Rushmore and a superior, and reached his "waiver" decision, which he revealed to "Senior management" of the Company, but not to the Union. The strategy was for the Company to go into contract negotiations without taking any position on the clerical employees' continued participation in the merit program. If "the Union failed to demand the inclusion of the employees in the 1980–81 merit and cost of living adjustment program prior to September 28, 1980, then the Company should consider this failure as a waiver of the Union's right to negotiate over this benefit" and the Company "would withdraw that program." The two other options were that the Company would also withdraw the program if a bargaining impasse was reached before the merit program due date or, in the most unlikely event of the Union's proposing before that date to accept the merit program in settlement of all economic demands, the Company would agree.

It is obvious that Industrial Relations Director Barr was not aware of this secret waiver strategy when he met with union negotiators Gipson and Meagher on August 25 and told them that the Company would not take any reprisals or change in existing benefits.

In late August, General Manager Rushmore advised Hickey and John McCarthy, manager of the Administrative Services Division, of the three options, directing "that if the union does not raise . . . the merit program, that it would be a waiver and that it would be taken away from the employees." Hickey, as chief negotiator, was not to propose any alternatives to the Union, but was to merely respond to any union proposals concerning the program.

4. Canceled benefits

Sometime during the last week in September, after bargaining sessions on September 8 and 22, Vice President Ewing decided to cancel the merit increases and cost-of-living adjustments that the clerical employees otherwise would have received on October 1 under the merit program. As instructed, company negotiator Hickey had said nothing in either meeting to reveal the Company's secret strategy of considering the merit-program benefits waived if the Union failed to demand their payment.

In both meetings, Hickey and Manager John McCarthy represented the Company. International Representative Gipson, President Meagher, employee Jola Stone (who kept notes during the meetings), and employees John Kalenda, Harold Curtis, and Lou Teliczan represented the Union.

The Union presented its proposals at the September 8 meeting, and the parties discussed them at that and the next meeting. Stone credibly testified from her notes that at the September 22 meeting, when "Meagher asked Mr. Hickey if he was ready to discuss our proposals No. 2 and No. 3" (requesting a "Substantial wage increase" and "All money lost on C.O.L.A. last twelve months"), "Mr. Hickey said that he did not want to discuss economics at this time."

Thus, Hickey was following Industrial Relations Director Barr's announced procedure of deferring the discussion of economic issues. Hickey gave the Union no indication that the Company had reversed Barr's promise not to change any of the clerical employees' benefits during the negotiations.

At the next bargaining session held October 2, committeeman Kalenda (as Stone credibly testified) "asked Mr. Hickey if we were going to get a merit increase and COLA roll-in like the nonunion employees at 200 Monroe received." Hickey then informed the Union that they would continue to receive the 29-cent COLA, but the 24 cents would not be rolled into their base pay, "and the rest could be negotiated at a later date."

The Company had canceled the bargaining unit employees' merit increases (which would have averaged 4 percent under Vice President Ewing's instructions); retained the old formula for computing the cost-of-living increase (with a 29-cent ceiling); continued to pay the 29-cent COLA on a quarterly basis without including the first 24 cents in the base pay; and canceled the employees' participation in the new COLA formula (which by then produced a COLA payment of 14 cents and by June of the next year, a total of 50 cents). There were two exceptions. The cancellation applied to 29 or 30 of the clerical employees at the distribution office, but not to 2 whom the Company considered confidential employees. The pay of one of these, Mary Carcini, was increased about $25 a week. She received her merit increase; 24 cents of the old COLA payment ($9.60 a week) was included in her base pay; and she was given the new 14-cent COLA payment, paid quarterly.

International Representative Gipson was not available for several of the meetings in October and November and missed the October 2 meeting. He later learned from President Meagher and the committee what had happened, and he was present when committeeman Kalenda again asked about the raise. This time Hickey answered that he was not going to talk about it.

5. Filing of charge

The Union did not immediately file a charge. The parties were discussing noneconomic issues and Barr had promised to come in and work out the economics after Hickey had finished the noneconomics. Hickey had given the Union no indication that the Company would object to granting retroactive benefits.

The Company and Union were still negotiating noneconomic issues in February when the Union filed a charge, challenging the legality of the Company's actions. By this time, the Company had canceled Mary Carcini's 14-cent COLA payment upon acknowledging that she was properly included in the office-clerical bargaining unit, and had deducted from her January 27 paycheck the portion of the COLA payment she had received since December 2. (Jt. Exh. 7.)

At the February 16 bargaining session, as note keeper Stone credibly testified, company negotiator Hickey proposed a union-employee nondiscrimination clause. "We told Mr. Hickey that we felt the company was discriminating against us because we didn't get our merit increase and our COLA," and that the Union could not accept the proposed clause in view of Carcini's increase being taken away.

On February 23, International Representative Gipson filed the original charge in this proceeding on behalf of the Union, charging 8(a)(1) coercion and 8(a)(5) refusal to bargain, and alleging "that at no time had management asked for the right to withdraw wages or other benefits from the workers" and that "2/16/81 the Union Neg[otiating] Comm[ittee] raised this point with the Co's Negotiator, M. Hickey." Then on March 30, shortly before the end of the 10(b) 6-month limitation period, the Union filed an amended charge, specifically alleging that the Company's October 1 unilateral actions and the withdrawal of Carcini's COLA benefit violated Section 8(a)(1), (3), and (5) of the Act.

At the beginning of the hearing, I approved a settlement agreement (G.C. Exh. 2), providing that employee Carcini be paid the portion of the COLA payment deducted from her paycheck and providing for the posting of a notice that the Company will not "unilaterally and without notice" to the Union "change any wages, hours or other terms and conditions of employment of our employees represented by it" and will not "cause cost of living payments due employees to be deducted from their paychecks in order to demonstrate to employees the detrimental effects" of being in the bargaining unit. The settlement agreement contains a nonadmission clause and a waiver of further remedial action for Carcini, but provides that the "General Counsel reserves the right to introduce evidence bearing on" the settled issues "concerning the remaining issues" in this case. At the time of hearing, Carcini was receiving the new 50-cent COLA payment and the merit increase which were being withheld from the other bargaining unit employees.

B. *Alleged Coercion*

1. Supporting evidence

The General Counsel contends that the Company's October 1 changes in its normal and traditional method for compensating the employees in the new bargaining unit, withdrawing merit-program benefits, restrained and coerced the employees in the exercise of the rights guaranteed in Section 7 of the Act. The Company contends that it had "a nondiscriminatory reason for not implementing the 1980-81 bargaining unit merit and cost of living adjustment program to bargaining unit employees."

The evidence indicates that when Vice President Ewing decided the last week in September to remove the bargaining unit employees from the merit program, he intended to deprive them permanently of the benefits during extended negotiations as a means of encouraging them to decertify the Union and discouraging other employees from seeking union representation.

The first indication of such a motivation was in the July 7 letter which Ewing mailed to each of the bargaining unit employees, urging rejection of the Union in the July 17 election and referring to decertification of employees at a "sister" company, Great Lakes Gas Transmission, and the loss of their wage and fringe benefit increases. He pointed out that where there is a bargaining impasse with no strike, the employer has an obligation to bargain for a full year after certification, after which "the employees, if they so desire, can petition the NLRB for a decertification election." Then he referred to what happened to the Great Lakes Gas Transmission employees who went "through this traumatic experience" and "have finally been able to decertify the Union by a vote of 106 to 11." He added that "because of the problems involved, they ***have not received any wage or fringe benefit increases for over two years.***" (Emphasis supplied.)

On July 16, the day before the election, Vice President Ewing distributed a question-and-answer sheet, reviewing what he had told the employees in the 24-hour meeting and again referring to Great Lakes Gas Transmission. He stated that during the period of negotiations, the law does not require and it is company policy not to "automatically" extend improvements to members of the bargaining unit, referring to wages, benefits, and cost-of-living increases. On the other hand, he stated that "no wage increase or decrease or any change in benefits" could go into effect, until an impasse, without agreement by both parties. He did not refer in the fact sheet specifically to the clerical employees' merit program.

Thus, Vice President Ewing repeatedly referred in his campaign literature to what happened at Great Lakes Gas Transmission, where employees were deprived of "any wage or fringe increases for over two years" before they were finally "able to decertify the Union." Although he did not make an explicit threat to cancel the clerical enployees' participation in the merit program if they voted for union representation, his statements in the July 16 fact sheet, about improvements not being extended "automatically" to them, could be interpreted to imply that the Company might decide not to implement their merit-program benefits.

Four days after the union certification, as discussed above, Ewing decided on the secret waiver strategy for removing the bargaining unit employees from the merit program unless the Union specifically demanded their continued participation. On October 2, the day after the employees would have been granted the merit-program benefits if they had not voted for union representation, company negotiator Hickey informed the Union that the benefits had been withheld and "could be negotiated at a later date."

Other documentary evidence confirms that the Company intended to deprive the employees permanently of the benefits which were withheld during the extended negotiations, without paying them retroactively. When the Company agreed in December to include Mary Carcini in the bargaining unit and decided to cancel her participation in merit program's new COLA formula, as discussed above, Manager McCarthy wrote a memo to Ronald Linsley in the Grand Rapids distribution office confirming "your conversation today with Mark Hickey." (Jt. Exh. 7A.) After stating in the letter that Carcini "should be paid 14 cents per hour C.O.L.A. for all hours worked during the period October 1 through December 2, 1980," McCarthy stated, "This action is intended to treat as equals the above-mentioned employees [Carcini and one other employee] and the 30 Grand Rapids office employees that are still being paid C.O.L.A. under the old formula and ceiling." He indicated that the withheld merit-program benefits would not be paid retroactively, stating that at "the conclusion of contract negotiations," the negotiated COLA payments would begin on the "contract date" (not the date the benefits were withheld).

When the economics were reached in the negotiations (with Hickey instead of Barr representing the Company), Hickey made it clear to the union negotiators that the withheld benefits would not be paid retroactively. (It is undisputed that when Hickey presented the Company's wage package, it provided for some wage *cuts.* Finally, at the last (about the 50th) bargaining session held August 24, 1981, when the Company formally notified the Union that it did not intend to extend its 1981-82 merit program to the office employees but stated "we are prepared to meet with the Union to discuss this issue if the Union so desires" (G.C. Exh. 3), Hickey told the Union that he did not have a proposal, but "if you have a proposal, we'll consider it." As he had previously stated, International Representative Gipson said, "Our proposal is to leave the thing like it was. To pay them like you always have. Do you have a counter proposal?" Hickey answered, "No, we are willing to negotiate it, but we have no proposal."

The Company admits in its brief that its position has been that "If the parties negotiated an agreement covering that program after September 28, 1980, the employees would be covered as of the time when those negotiations have been completed."

Meanwhile, the union organizational efforts at the Company's downtown office in Grand Rapids have not been successful.

2. The Company's defenses

The Company contends that its "decision not to implement" the merit program for the clerical employees in the new bargaining unit was for "a nondiscriminatory reason," based "solely on economics" and "therefore removes from this case any Section 8(a)(3) connotations."

Despite the undisputed testimony by Union President Meagher that the Union had negotiated 66 cents in COLA catchup money (for wages lost in a 3-year period from the COLA ceiling) in the recent negotiations covering the Grand Rapids field and service employees, Vice President Ewing testified that the 8-1/2-percent merit program was "the maximum that the Company could afford" because of the "regulatory environment," and that anything above the 8-1/2-percent Federal wage guideline (later adjusted to 9 percent) "could not have been recovered through the rate making or regulatory process." However, even if this position were accurate, it would merely provide a reason for refusing to grant wage increases beyond the merit program. It would not justify discriminatorily canceling the employees' participation in the program, then depriving them permanently of the canceled benefits throughout protracted negotiations.

Vice President Ewing also gave the defense: "To extend some amount greater than that, to a smaller population [the 30 to 32 office clerical employees] . . . could have adverse and serious consequences on the balance of that population [the remaining 2,400 participants in the merit program]." This defense acknowledges the Company's concern about any of the nonunion office clerical or other nonbargaining unit employees joining a union and seeking higher wages. It also explains why the Company would be motivated to take reprisals against employees in a new bargaining unit, depriving them of wage increases they otherwise would have received as a means of demonstrating to them and others that they would be better off without union representation.

3. Concluding findings

The Company had good relations with the Union insofar as bargaining unit field and service employees were concerned, but it vigorously opposed the office employees voting for union representation.

In the election campaign (following three earlier unsuccessful organizing efforts), Vice President Ewing refrained from explicitly threatening to cancel the clerical employees' participation in the merit program if they voted for union representation, apparently in fear of providing a basis for setting aside any election which the Company might win. Instead, he repeatedly referred to what happened at a "sister" gas company, Great Lakes Gas Transmission, where there were an impasse in negotiations, a decertification, and a loss of wage and fringe benefit increases "for over two years," and he informed the employees that wage, benefit, and COLA increases would not be extended "automatically" to them during negotiations. Then after the Union won the election, he adopted the secret waiver strategy, to consider the merit program waived if the Union failed to demand its continuation. He also overruled the industrial relations director's promise not to change any existing benefits, withheld the merit-program benefits and, without any economic justification, did so with a determination (not revealed to the Union for several months) of never reimbursing the employees for the benefits lost during protracted negotiations. He indicated at the hearing the Company's concern for the "adverse and serious consequences" that granting any additional wage increase to the new bargaining unit would have on the other participants in the merit program. I find that his conduct reveals that he was motivated by a determination, first, to defeat the latest organizational effort, and second, if that failed, to overcome the election defeat by canceling the employees' participation in the merit program, permanently depriving them of wage increases during protracted contract negotiations, to encourage them to seek decertification, as at Great Lakes Gas Transmission.

I therefore find that the Company removed the employees from the merit program, canceling their scheduled merit increases and cost-of-living adjustments due October 1, in reprisal for their engaging in protected concerted activity, thereby restraining and coercing them in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

C. *Alleged Refusal To Bargain*

1. The allegations

The Union was certified July 25 to represent an admittedly appropriate bargaining unit:

> All full-time and regular part-time clerks, dispatchers, and draftpersons employed by the Employer at its facility located at 444 Wealthy Street, S.W., Grand Rapids, Michigan; but excluding confidential employees, guards and supervisors as defined in the Act, and all clerical employees in the Administrative Services Division.

The amended complaint alleges that on or about October 1, and continuing to date, "without prior notice to the Charging Union and without offering the Charging Union a meaningful opportunity to bargain about the changes before they were decided upon," the Company changed its normal and traditional method for compensating employees in the new bargaining unit by (a) failing to roll-in the cost-of-living benefits to the weekly pay rate, (b) failing to grant merit increases, and (c) failing to grant a 14-cent COLA benefit for all hours worked from October 1 through December 31, violating Section 8(a)(5) as well as Section 8(a)(1) of the Act.

2. Company defenses

As found, the Company unilaterally canceled the merit increases and cost-of-living adjustments due the clerical employees October 1 under the merit program, without raising the subject at the only two preceding bargaining sessions, held September 8 and 22. Vice President Ewing did not specifically mention the merit program in his campaign literature dated July 7 and 16, and he deliberately concealed from the Union his strategy of considering the program waived unless the Union demanded the employees' continued participation. Meanwhile, Industrial Relations Director Barr, before being informed of the secret waiver strategy, had assured the Union that the Company would not change any existing benefits. After much evasion, Ewing finally admitted on cross-examination that he did not decide to withdraw the merit program from the bargaining unit employees until the last week in September.

Yet the Company devotes a large part of its exhaustive brief to arguing that the union negotiators, or the committee members, or the employees in the bargaining unit knew or should have known that the merit program would not be implemented for the employees unless agreement was reached on the program before the due date. It argues that the Union "not only did not demand bargaining on this benefit, but purposely refused to bargain on this issue on the mistaken belief that by refusing to bargain, the Respondent would be required to grant the benefit to the employees"; that the Company's timely notice to the Union afforded it sufficient opportunity to bargain; and that having failed to exercise its right to demand bargaining on the merit program, the Union did not preserve its right to bargain on the subject and cannot now claim an unlawful refusal to bargain.

In making these arguments, the Company completely ignores the undisputed, credited testimony that Industrial Relations Director Barr promised Union Negotiators Gipson and Meagher in an August 25 luncheon meeting not "to take any reprisals" against the employees for voting for union representation and "not [to] change any existing benefit."

I reject the argument that Vice President Ewing placed the Union and the employees on notice during the election campaign—3 months before he made the decision—that the merit program would be withdrawn. When International Representative Gipson first saw Ewing's July 7 letter and July 16 question-and-answer sheet sometime during the protracted negotiations the following year (long after the October 1 cancellation of the merit-program benefits), he thought the Company had illegally suggested in the fact sheet that it would not continue the employees' merit program if they voted for the Union, but Barr had told him differently, before the September 8 and 22 bargaining sessions, that the Company "would not change any existing benefit." President Meagher, who had expressed his belief to the employees during the campaign "that under the law, nothing could change until it's bargained away," had not seen the July 16 fact sheet. He had glanced at (without reading) the July 7 letter when employees complained about its being mailed to their homes. (Meagher credibly explained that "after all these other times for about 15 years" that the office clerical employees had been seeking union representation, he thought the "people really wanted a union"; that "The propaganda the company put out was not really going to sway them one way or the other . . . . So that's why I really didn't worry about the letters being sent out or a lot of things being said." Committee member Stone confirmed that Ewing stated in the preelection, 24-hour meeting, there would not be any automatic adjustment—she erroneously interpreting his statements to mean an immediate wage freeze "if we voted in the union"—but she did not mention to Meagher anything that was said in Ewing's speech. At most, by stating that improvements would not be extended automatically during the negotiations, Ewing implied during the election campaign that the Company may decide not to implement the employees' merit-program benefits. Particularly, I find that Barr's undisputed promise of no changes in existing benefits did not place the Union or the employees on notice that the Company intended to change the employees' conditions of employment in the absence of an agreement on the merit program.

I also reject the Company's argument that the Union had proper notice because the employees "knew or should have known" from not receiving their merit reviews that the merit increases and COLA adjustments under the merit program would be taken away unless the Union negotiated their continuation by the due date. The nonbargaining unit employees were evaluated before September 15, but General Manager Rushmore had secretly instructed the bargaining unit employees' supervisors "don't evaluate them. If we need evaluations, I will notify you." (Vice President Ewing admitted that merit reviews could have been made later; Rushmore testified that "a supervisor is evaluating employees everyday that he works with them" and that documenting it on a piece of paper could be accomplished in a workday.) Pursuant to its secret waiver strategy, the Company remained silent about the merit reviews, telling neither the employees nor the Union that the evaluations were being delayed or that cancellation of the merit program was being considered. When committee member Stone did not receive her merit review by September 15, she was under the mistaken impression from what Ewing had stated in the election campaign that her merit increase and COLA adjustments had already been frozen—having no way of knowing, as Ewing reluctantly admitted at the hearing, that he did not decide to withdraw their merit-program benefits until the last week in September. Neither she nor union negotiators Gipson and Meagher (who had received the assurances from Barr) had any notice that unless the Union raised this economic issue before the end of the month, the Company would consider the merit-program benefits waived and would withdraw them. In fact, not only did company negotiator Hickey fail to put Gipson and Meagher on notice that the Company would not honor Barr's promise not to change the existing benefits, but Hickey led Gipson and Meagher to believe that the negotiation of such economic issues was to be deferred, telling them at the September 22 bargaining session that "he did not want to discuss economics at this time."

I further reject the Company's argument that the news item entitled "8.5% Merit Program Announced" in the

Company's September 25 house organ, the Pilot Light, placed the Union on notice. This was a routine article, appearing each year before the effective date of the merit program, and announced the payroll increases for "exempt and non-exempt, non-union employees"—referring to the 2,400 participants in the program. It, of course, did not state whether the Company intended to withdraw these benefits, without notice, from the bargaining unit employees during the ongoing negotiations. Gipson credibly testified that when he received his copy, he understood from what Barr had said that the clerical employees would continue to be treated in the same manner. "They weren't nonunion employees as of September 25" but "I expected them to be treated in the same manner and respect as the nonunion employees . . . [b]ecause Mr. Barr told . . . me and John Meagher that they would not change any existing benefit or the way the people were treated, that they would go on just like they were. This was an existing benefit . . . ."

The Company, relying on testimony of General Manager Rushmore, further argues that "The record is conclusive that Mr. Meagher had notice on two occasions prior to September 28, 1980, that the Respondent was not going to put into effect on that date the 1980–1981 merit and cost of living adjustment program for the collective bargaining unit employees unless the parties had negotiated their inclusion prior to that date." Even if Rushmore's dubious testimony were credited, it would not prove that Meagher had such notice.

The Company contends that the first occasion was August 25, when Rushmore and Meagher talked privately after discussing some field-contract problems at a breakfast meeting. Contrary to the testimony of Meagher and committee member Stone (that Meagher had not been informed what Vice President Ewing told the employees in his 24-hour speech before the July 17 election, Rushmore claimed on direct examination that when he and Meagher stayed behind after the meeting, Meagher commented "that he certainly could have filed an unfair labor practice charge" against the Company for what was said about Great Lakes Gas Transmission in the 24-hour speech, because in his mind, the Company was threatening the employees; "My response to that was that I certainly didn't think that we were, and well, he says are you trying to scare the people in that they won't get their money, and I said no, John, we really aren't, and he said well, we are going to make this collective bargaining so easy for you that they'll probably get their money before anybody else does." Thus, even if Meagher had been aware of what Ewing told the employees about Great Lakes Gas Transmission Company and had accused the Company of threatening and trying to scare the employees about receiving their merit-program benefits, Rushmore denied that the Company had done or was doing so. According to this testimony given by Rushmore on direct examination, neither he nor Meagher mentioned the Company's withdrawing the employees' scheduled merit increases or COLA adjustments unless the parties agreed to their continued participation in the merit program by a certain date.

The Company argues, however, that Meagher "was aware that the Respondent was not going to include the bargaining unit employees in the 1980–81 merit and cost of living adjustment program unless negotiated"—citing Rushmore's claim, "I told [Meagher] everything had to be discussed at the table." Rushmore made no such claim on direct examination. He gave that answer on cross-examination in an apparent evasion of the question asked. He testified:

> Q. Did you tell [Meagher] at that meeting that the company had proposed to withdraw its merit increase program with respect to the office clerical employees in the union?
> A. I told him everything had to be discussed at the table.
> Q. That was not my question . . . . Did you tell him at that meeting . . . that the company had decided to withdraw the merit review, merit program and the cost of living adjustment program for the office clerical employees that were in the bargaining unit?
> A. We hadn't decided to withdraw it, so I couldn't have told him that, no.
> Q. Did you tell him that you were thinking of withdrawing it?
> A. No, I did not.

Thus, Rushmore made the claim that he told Meagher that "everything had to be discussed" when trying to evade answering the question about whether he informed Meagher that the Company proposed to withdraw the employees' merit program. Even if Rushmore's testimony on direct examination were accurate, there was no occasion for Rushmore's making this statement to Meagher. Rushmore did not impress me by his demeanor as being a candid witness when so testifying. I specifically discredit this statement as a fabrication, given in an effort to conceal the fact that Rushmore did not inform Meagher that the Company proposed to withdraw the merit-program benefits. However, even if all of Rushmore's testimony about the private conversation were credited, it would not establish that the Union had timely notice of Ewing's decision a month later to withdraw these benefits.

Concerning Rushmore's credibility, I also discredit his claim that before the first bargaining session on September 8, he received an official confirmation from Ewing to the effect that the bargaining unit employees would not receive any merit increase or COLA adjustment. Not only did Ewing's September 4 instructions (Jt. Exh. 3), to which Rushmore referred, make no mention of withdrawing the employees' merit-program benefits, but Ewing most reluctantly admitted that he did not decide to withdraw the merit program from them until the last week in September, *after* both bargaining sessions.

Rushmore also claimed that on a second occasion, about September 10 (shortly after the first bargaining session on September 8), Meagher asked him, "I understand you are giving out pay raises for everybody else at Wealthy, what are you going to do for my people? I said John, you know I'm not going to do anything for them, that everything that happens for your people must be done at the bargaining table. And he said, oh, come on, you can be a nice guy. If I'll agree to it, you can give them a pay raise. I said no, that's not the rules that we're playing by. The rules are bring it up at the table and that's where we're going to work it out." I discredit this claim as a further fabrication. As Meagher credibly testified, they were talking about the field and service employees, not the clerical employees. Meagher told Rushmore, "Hey, we need some more raises down there. They have put through three leader jobs, so that makes room for three technicians." The only comments about the clerical employees was Rushmore's inquiry about how the negotiations were going; Meagher said, "Well, we have only had one meeting, I can't tell"; Rushmore suggested they keep the two groups separated, "Let's not put them together"; and Meagher agreed. Moreover, even if Rushmore's testimony were true, he did not put the Union on notice that the Company planned to withdraw the employees' merit increases and COLA adjustments unless negotiated.

3. Concluding findings

It is well settled that an employer violates Section 8(a)(5) of the Act when it makes changes in working conditions without notice to, and consultation with, the union which represents the employer's employees. *N.L.R.B.* v. *Katz, et al.*, 369 U.S. 736, 747 (1962). "During negotiations the employer's obligation under Katz is to maintain the dynamic status quo . . . including granting previously announced wage increases." *Eastern Maine Medical Center* v. *N.L.R.B.*, 658 F.2d 1, 8 (1st Cir. 1981).

It is undisputed that the Company remained silent during the September 8 and 22 bargaining sessions about any plans to withdraw the scheduled merit-program benefits from the bargaining unit employees, and that it deliberately concealed from the Union its secret waiver strategy of considering the benefits waived unless the Union raised the issue in negotiations before their due dates. Yet, the Company contends that the Union was placed on notice because the Union or the employees knew or should have known that the merit program would not be implemented for the employees unless negotiated.

In making this contention, the Company completely ignores in its lengthy brief the undisputed, credited testimony that before the negotiations began, Industrial Relations Director Barr promised union negotiators Gipson and Meagher that the Company would not change any existing benefits during the negotiations. Moreover, as found above, the evidence shows that the Company did not give either the Union or the employees prior notice; that the decision to cancel the merit increases and cost-of-living adjustments due the employees October 1 under the merit program was not made until the last week in September; and that the Company first notified the Union at the October 2 bargaining session, when the unilateral cancellation of the benefits was an accomplished fact.

The evidence is clear that as a result of this unilateral action, bargaining has been disrupted on economic issues. Similarly, in *N.L.R.B.* v. *Allied Products Corporation*, 629 F.2d 1167, 1169 (6th Cir. 1980), a case also involving the unilateral discontinuing of merit increases, the court quoted approvingly from the Board's decision, 218 NLRB 1246 (1975): "[T]he fact that Respondent presented the Union with a *fait accompli* at the outset of negotiations must necessarily have obstructed meaningful bargaining." The court then found, *id.* at 1170, quoting from its earlier opinion in the case, 548 F.2d 644, 652 (1977):

> The fact that the Company offered to discuss *re-institution* of the merit increase does not mitigate its violation by unilaterally *discontinuing*, without negotiation with its employees' representative, the established merit review procedure.

I therefore find that on October 1, the Company changed working conditions without prior notice to the Union by unilaterally removing the bargaining unit employees from the merit program, thereby canceling their scheduled COLA roll-in and merit increases, and the payment of the new COLA benefit, in violation of Section 8(a)(5) of the Act.

In view of the necessary remedial action, to restore the *status quo ante* and make the employees whole as discussed below, I find it unnecessary to rule (as urged by the General Counsel at the trial but opposed by the Company) on whether the Company further violated Section 8(a)(5) at the beginning of each subsequent quarter when it failed to pay the bargaining unit employees the latest COLA increase.

Conclusions of Law

1. By removing the bargaining unit employees from the merit program in reprisal for engaging in protected concerted activity, the Company restrained and coerced them in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

2. By unilaterally changing the bargaining unit employees' working conditions without prior notice to the Union, canceling their scheduled COLA roll-in, merit increases, and new cost-of-living payment, the Company violated Section 8(a)(5) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As found, the Respondent unilaterally altered existing benefits, disrupting meaningful bargaining, in violation of Section 8(a)(5) by removing the bargaining unit employees from the merit program and canceling the scheduled wage increases due them October 1, 1980, without prior notice to the Union. Pursuant to the Board's established, court-approved policy, *N.L.R.B.* v. *Allied Products Corporation, supra* at 1168–69, 1173, I find it necessary to order the Respondent to restore the *status quo ante* to the extent feasible by reinstituting the employees' participation in the merit program retroactive to that date and by awarding them the benefits they would have received under the program since then. "To hold that bargaining in such circumstances is an adequate substitute for remedial action would unwarrantedly relieve Respondent of its statutory obligation to maintain existing benefits during negotiations and unjustifiably ignore the rights of those employees who may have been adversely affected by Respondent's breach of that duty." *Id.* at 1169. Obviously this remedial action, making these 30 or 31 office clerical employees whole, for the lost wage increases which the remaining 2,400 participants in the program have been receiving since that date, would not impose an undue or unfair burden upon the Respondent.

I also find that restoration of the *status quo ante* is necessary to remedy the Respondent's violation of Section 8(a)(1). As found, the Respondent removed the employees from the merit program, with the intention of permanently depriving them of their scheduled wage increases during protracted contract negotiations, as an object lesson—to these employees who voted for union representation and to any other group that may want to follow suit. All other bargaining and nonbargaining unit employees have been receiving their contractual or merit-program wage increases, while this small unit of office clericals have had their wage increases frozen into the second year. The Company took the position, in about the 50th bargaining session, that it was willing to negotiate on the withheld wage increases but that it had no proposals and that it refused to grant any benefits retroactively. In doing so, the Company was giving the employees a graphic demonstration of why Vice President Ewing repeatedly referred in his campaign literature to what happened at the "sister" company, Great Lakes Gas Transmission, where employees were deprived of "any wage or fringe increases for over two years" before they were finally "able to decertify the Union." As found, the Company withheld the scheduled wage increases with the motivation of encouraging employees to seek decertification of the Union, as at Great Lakes Gas Transmission, and dissuading other employees from seeking union representation. Under these circumstances, I reject the Company's contention that if a violation is found, the remedy should be limited to a bargaining order "with no back pay."

Accordingly I find it necessary to order the Respondent to reinstitute the merit program for the bargaining unit employees, retroactive to October 1, 1980, and to make the employees whole by paying them the differences between their actual wages and the wages they would have received from that date until the date the program is reinstated, including all merit increases, cost-of-living roll-ins, and cost-of-living adjustments accruing during that period, with interest as computed in *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[3]

The Respondent, Michigan Consolidated Gas Company, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Removing employees from the merit program in reprisal for their engaging in collective bargaining or other protected concerted activity.

(b) Unilaterally discontinuing employees' merit increases and cost-of-living adjustments without prior notice to or bargaining with Local 132, International Chemical Workers Union, AFL-CIO.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of enployment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time clerks, dispatchers, and draftpersons employed by the Employer at its facility located at 444 Wealthy Street, S.W., Grand Rapids, Michigan; but excluding confidential employees, guards, and supervisors as defined in the Act, and all clerical employees in the Administrative Services Division.

(b) Reinstitute the employees' merit program, including the merit increases and cost-of-living adjustments, retroactive to October 1, 1980, and make the employees whole for all lost merit-program benefits since that date as set forth in the Remedy section of this Decision.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Wealthy Street facility in Grand Rapids, Michigan, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply.

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT remove you from the merit program in reprisal for your engaging in collective bargaining.

WE WILL NOT unilaterally discontinue your merit increases and cost-of-living adjustments without prior notice to or bargaining with Local 132, International Chemical Workers Union, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, bargain with the Union, and put in writing and sign any agreement reached on terms and conditions of employment covering our employees in the following bargaining unit:

All full-time and regular part-time clerks, dispatchers, and draftpersons employed by us at our facility located at 444 Wealthy Street, S.W., Grand Rapids, Michigan; but excluding confidential employees, guards, and supervisors as defined in the Act, and all clerical employees in the Administrative Services Division.

WE WILL reinstate your merit program, including the merit increases and cost-of-living adjustments, retroactive to October 1, 1980, and WE WILL make you whole for all lost merit-program benefits since that date, plus interest.

MICHIGAN CONSOLIDATED GAS COMPANY